

Serial: 228947

IN THE SUPREME COURT OF MISSISSIPPI

No. 89-R-99013-SCT

IN RE: CODE OF JUDICIAL CONDUCT

ORDER

This matter is before the en banc Court on the Court's own motion. After due consideration, the Court finds that Canon 5C(2) and Canon 5F of the Code of Judicial Conduct shall be amended as set forth in Exhibit A.

IT IS THEREFORE ORDERED that the Code of Judicial Conduct is hereby amended as set forth in Exhibit A. The amendments shall take effect immediately upon entry of this Order.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this Order upon the minutes of the Court and shall forward a true copy hereof to West Publishing Company for publication in the next edition of the *Mississippi Rules of Court* and in the *Southern Reporter, Third Series (Mississippi Edition)*.

SO ORDERED, this the 12th day of December, 2019.

/s/ Dawn H. Beam

DAWN H. BEAM, JUSTICE
FOR THE COURT

AGREE: RANDOLPH, C.J., COLEMAN, MAXWELL, BEAM, CHAMBERLIN, ISHEE
AND GRIFFIS, JJ.

AGREES IN PART: KITCHENS, P.J.

AGREES IN PART AND DISAGREES IN PART: KING, P.J.

RANDOLPH, C.J., SPECIALLY CONCURRING WITH THE ORDER WITH SEPARATE WRITTEN STATEMENT JOINED BY MAXWELL, BEAM, CHAMBERLIN AND GRIFFIS, JJ.; ISHEE, J., JOINS IN PART.

KING, P.J., OBJECTING TO THE ORDER IN PART WITH SEPARATE WRITTEN STATEMENT JOINED BY KITCHENS, P.J.

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RANDOLPH, CHIEF JUSTICE, SPECIAL CONCURRENCE TO THE ORDER:

¶1. The issue of whether language should be eliminated from Canon 5C(2) has been vetted for more than six months. The vetting of Canon 5C(2) began shortly after the Report of the 2018 Special Committee on Judicial Election Campaign Intervention was filed. This document was filed and furnished to all members of this Court on May 30, 2019. Shortly after the filing, the Mississippi Commission on Judicial Performance and legal counsel met with members of this Court to vet this Report and other matters related to Canon 5C(2). The language also was vetted by this Court's Rules Committee on the Legal Profession, followed by en banc discussions in the ensuing months before entry of this Order.

¶2. The 2007 American Bar Association Model Code of Judicial Conduct has never been fully incorporated into the Mississippi canons. *See* Canon 5C(4) cmt. Much of the ABA's 2007 revision was in response to the United States Supreme Court ruling in *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002). In *White*, the court ruled that a state judicial-conduct rule that prohibited judicial candidates from announcing their views on legal and political issues was unconstitutional. *Id.* at 788.

¶3. Since *White*, a number of other federal courts also have ruled that other judicial code restrictions on judicial candidates were unconstitutional. For example, on remand in *White*,

the United States Court of Appeals for the Eighth Circuit invalidated Minnesota’s rules barring judicial candidates from attending political events, endorsing candidates, announcing their party affiliations, and seeking endorsements. *Republican Party of Minn. v. White*, 416 F.3d 738, 755-66 (8th Cir. 2005).

¶4. In Mississippi, United States District Judge Henry Wingate considered a constitutional challenge to the Mississippi statute that prohibited political parties from being involved in judicial elections.¹ In *Mississippi Republican Party v. Musgrove*, No. 3:02CV1578WS (S.D. Miss. Oct. 21, 2002), Judge Wingate ruled,

Mississippi Code Annotated § 23-15-976, as amended in 1999, with the exception of the first sentence stating “[a] judicial office is a nonpartisan office and a candidate for election thereto is prohibited from campaigning or qualifying for such an office based on party affiliation,” is hereby declared violative of the First and Fourteenth Amendments to the Constitution of the United States.

It is further ORDERED that although the named plaintiff in this litigation is the Mississippi Republican Party State Executive Committee, the fundamental constitutional right to free speech is also equally enjoyed by the Mississippi

¹ Mississippi Code Section 23-15-976 (Rev. 2018) provided,

A judicial office is a nonpartisan office and a candidate for election thereto is prohibited from campaigning or qualifying for such an office based on party affiliation [P]olitical parties and any committee or political committee affiliated with a political party shall not engage in fund-raising on behalf of a candidate or officeholder of a nonpartisan judicial office, nor shall a political party or any committee or political committee affiliated with a political party make any contribution to a candidate for nonpartisan judicial office or the political committee of a candidate for nonpartisan judicial office, nor shall a political party or any committee or political committee affiliated with a political party publicly endorse any candidate for nonpartisan judicial office. No candidate or candidate’s political committee for nonpartisan judicial office shall accept a contribution from a political party or any committee or political committee affiliated with a political party.

Democratic Executive Committee, and all similar political parties. Since the prohibitions in question have been declared unconstitutional, the relief afforded to the plaintiff enures to the benefit of all political parties.

Judge Wingate ruled that political parties, just as any other citizen or association, has a constitutional right to participate in judicial elections, including the endorsement of judicial candidates. Indeed, the present commentary to Canon 5C(1) reads, “Attending or speaking at a political party gathering in the judge’s own behalf while a candidate does not constitute alignments or affiliation with the party sponsoring the gathering.” Canon 5C(1) cmt.

¶5. Thus, today’s amendment of Canon 5C(2) is based upon the United States Supreme Court’s interpretation of our Constitution and a federal district court’s interpretation of our statutes. Only after extended, careful review and study did I, and other members of this Court, agree to amend Canon 5C(2). My actions were neither hasty nor did they lack careful consideration.

¶6. While public comments on policy issues are important, amending Canon 5(c)(2) was a legal decision, controlled by caselaw and other rules of this Court.

MAXWELL, BEAM, CHAMBERLIN AND GRIFFIS, JJ., JOIN THIS SEPARATE WRITTEN STATEMENT. ISHEE, J., JOINS THIS SEPARATE WRITTEN STATEMENT IN PART.

IN THE SUPREME COURT OF MISSISSIPPI

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KING, PRESIDING JUSTICE, OBJECTING TO THE ORDER IN PART WITH SEPARATE WRITTEN STATEMENT:

¶7. With relatively little review, and without allowing for public comment,² today this Court amends Canon 5C(2) of the Code of Judicial Conduct by eliminating the prohibition against a judicial candidate’s “personally solicit[ing] publicly stated support.” Canon 5C(2) currently provides,

A candidate shall not personally solicit or accept campaign contributions or *personally solicit publicly stated support*. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate’s campaign and *obtain public statements of support for the candidacy*. . . .

(Emphasis added.)

¶8. Believing this to be a hasty and not-carefully-considered action, I object to this order. The Mississippi Code of Judicial Conduct, which is based on the American Bar Association’s Model Code of Judicial Code, was adopted on October 25, 1974, by the Mississippi Conference of Judges. Canon 5C(2), which this Court amends today, was adopted in October 1974 as Canon 7B(2), and provided,

²See M.R.A.P. 27(f) (providing for public comment unless the Court deems such publication and comment process will unnecessarily delay rule amendment).

A candidate, including an incumbent judge, for judicial office that is filled by public election between competing candidates should not himself solicit or accept campaign funds, *or solicit publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy.*

(Emphasis added.)

¶9. Since its adoption by the Mississippi Conference of Judges, the Code of Judicial Conduct has been amended many times by order of this Court. Generally those amendments have closely approximated the revisions to the ABA Model Code of Judicial Conduct. Until 2007, similar to our Code of Judicial Conduct, the ABA Model Code of Judicial Conduct prohibited judicial candidates from personally soliciting any type of publicly stated support. In 2007, the ABA amended its model code to allow nonpartisan judicial candidates to “seek, accept, or use endorsements from any person or organization *other than a partisan political organization.*” ABA Model Code of Judicial Conduct, Rule 4.2(b)(5) (emphasis added). Thus, although the ABA made some provision to allow candidates to solicit support on their own, the model rule continues to set apart nonpartisan judicial candidates from partisan politics. The amendment adopted by the Court today makes no such divide.

¶10. Today, contrary to Mississippi’s policy of nonpartisan judicial elections, the amendment adopted by this Court allows nonpartisan judicial candidates to seek endorsements from partisan political organizations. In 1994, the Mississippi Legislature, consistent with its constitutional authority, established the policy that all county court, chancery court, circuit court, appeals court judges, and Supreme Court justices should be

elected in nonpartisan elections. Miss. Code Ann. § 23-15-973 (Rev. 2018) (“In order to give further and every possible emphasis to the fact that the said judicial offices are not political but are to be held without favor and with absolute impartiality as to all persons, . . . , the judges thereof should be as far removed as possible from any political affiliations or obligations.”). Notwithstanding this policy as established by the Mississippi Legislature, and inconsistent with the ABA Model Code of Judicial Conduct, today’s majority completely removes any and all limitations upon the personal solicitation of publicly stated support.

¶11. It would appear that the primary purpose, if not sole purpose, of this action is to bring partisan politics into Mississippi’s judicial elections. I therefore object to the entry of this order.

¶12. A special concurrence has been written to today’s order. The author of that special concurrence takes exception to my statement that the action being taken is done in haste, without careful consideration and with relatively little review. The author then seeks to validate his position by a description of the supposed vetting process. I respect the right of the author to disagree with me. However, I also feel an obligation to state my disagreement when I view the events differently.

¶13. The term vetted suggests having undertaken a careful and critical examination of an issue. Contrary to the special concurrence, a careful and critical examination is not what occurred with this issue.

¶14. I therefore object in part to the entry of this order.

KITCHENS, P.J., JOINS THIS SEPARATE WRITTEN STATEMENT.

EXHIBIT A

Canon 5C(2)

A candidate shall not personally solicit or accept campaign contributions ~~or personally solicit publicly stated support~~. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for the candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions ~~and public support~~ from lawyers. A candidate's committees shall not solicit or accept contributions and public support for the candidate's campaign earlier **than the date the candidate qualifies as a candidate** ~~than 60 days before the qualifying deadline~~ or later than 120 days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

Commentary

There is legitimate concern about a judge's impartiality when parties whose interests may come before a judge, or the lawyers who represent such parties, are known to have made contributions to the election campaigns of judicial candidates. Section 5C(2) recognizes that in many jurisdictions judicial candidates must raise funds to support their candidacies for election to judicial office. It therefore permits a candidate, other than a candidate for appointment, to establish campaign committees to solicit and accept public support and financial contributions. Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may, by virtue of their size or source, raise questions about a judge's impartiality and be cause for disqualification as provided under Section 3E.

Campaign committees established under Section 5C(2) should manage campaign finances responsibly, avoiding deficits that might necessitate post-election fund-raising, to the extent possible. Such committees must at all times comply with applicable statutory provisions governing their conduct.

Section 5C(2) does not prohibit a candidate from initiating an evaluation by a judicial selection commission or bar association, or, subject to the requirements of this Code, from responding to a request for information from any organization.

Canon 5F

F. Special Committee--Proceedings and Authority.

(1) Establishment. In every year in which an election is held for Supreme Court, Court of Appeals, chancery court, circuit court or county court judge in this state and at such other times as the Supreme Court may deem appropriate, a Special Committee on Judicial Election Campaign Intervention (“Special Committee”) shall be created whose responsibility shall be to issue advisory opinions and to deal expeditiously with allegations of ethical misconduct in campaigns for judicial office. **Each Special Committee shall be appointed no later than December 15 in the year prior to their service, and it shall continue in existence for ninety (90) days following such judicial elections or for so long thereafter as is necessary to consider matters submitted to it within such time.**

(2) Special Committee Membership. The committee shall consist of five (5) members. The Chief Justice of the Supreme Court; the senior justices of Supreme Court Districts 1, 2, and 3, excluding the Chief Justice; and the Chief Judge of the Court of Appeals, shall each appoint one member. All members shall be attorneys licensed to practice in the state. No person shall be appointed to serve as a member of a Special Committee for the year in which such person is a candidate for judicial office, **or is connected to a candidate for judicial office by affinity or consanguinity. Members shall not publicly endorse judicial candidates or contribute funds to judicial campaign committees. Members are subject to the conflict of interest and recusal provisions set forth in the Code of Judicial Conduct.** Should the Chief Justice of the Supreme Court expect to be a candidate for judicial office during the year for which a Special Committee is to be appointed the Chief Justice shall declare such expectation, and in such event, the appointment which otherwise would have been made by the Chief Justice shall be made by the next senior justice of the Supreme Court who is not otherwise charged with appointing authority under this Canon and not seeking judicial office in such year. Should a senior justice of Supreme Court Districts 1, 2, or 3, excluding the Chief Justice, expect to be a candidate for judicial office during such a year, the next senior justice of the same Supreme Court District who is not otherwise charged with appointing authority and is not seeking judicial office shall make the appointment. Likewise, should the Chief Judge of the Court of Appeals expect to be a candidate for judicial office during such a year, the next senior judge of the Court of Appeals who is not seeking judicial office shall make the appointment.

(3) Quorum and Objective. Any action taken by the Special Committee shall require a majority vote. ~~Each Special Committee shall be appointed no later than February 1 in the~~

~~year of their service, and it shall continue in existence for ninety (90) days following such judicial elections or for so long thereafter as is necessary to consider matters submitted to it within such time.~~ The Commission shall provide administrative support to the Special Committee. Should any appointing authority fail to make an appointment, three members shall constitute a sufficient number to conduct the business of the Special Committee.

The objective of the Special Committee shall be to alleviate unethical and unfair campaign practices in judicial elections, and to that end, the Special Committee shall have the following authority:

(~~+~~ a) **Notice of Candidacy.** Within ten (10) days of the effective date of this rule or within the ten (10) days after formally announcing and/or officially qualifying for election or re-election to any judicial office in this state, whichever is later, all candidates, including incumbent judges, shall forward ~~written~~ notice of such candidacy, together with an appropriate mailing address and telephone number **and email address of the candidate and Committee chair,** to the Commission **on Judicial Performance.**

(b) Candidate Materials. Upon receipt of such notice, the Special Committee shall, through the Commission, **make available electronically or** ~~cause to be distributed to all such candidates by certified mail-return receipt requested~~ copies of the following: Canon 5 of the Code of Judicial Conduct; summaries of any previous opinions issued by the Special Committee, Special Committees organized for prior elections, or the Supreme Court of Mississippi, which relate in any way to campaign conduct and practices; ~~and a form acknowledgment, which each candidate shall promptly return to the Commission and therein certify that the candidate has read and understands the materials forwarded and agrees to be bound by such standards during the course of the campaign.~~

(c) Election Seminar. **Persons who seek to have their name placed on the ballot as candidates for such judicial offices and the judicial candidates' election committee chairpersons, or the chairperson's designee, shall no later than 20 days after the qualifying date for candidates in the year in which they seek to run complete a two-hour course on campaign practices, finance, and ethics sponsored and approved by the Committee. Candidates without opposition are exempt from attending the course.**

~~A failure to comply with this section shall constitute a per se violation of this Section authorizing the Committee to immediately publicize such failure to all candidates in such race and to all appropriate media outlets.~~

(4) Opinions. In the event of a question relating to conduct during a judicial campaign, judicial candidates, their campaign organizations, and all independent persons, committees and organizations are encouraged to seek an opinion from the Special Committee before such conduct occurs.

(2 a) Opinions as to the propriety of any act or conduct by a judicial candidate, a candidate's campaign organization or an independent person, committee or organization conducting activities which impact on the election and as to the construction or application of Canon 5 may be provided by the Special Committee upon request from any judicial candidate, campaign organization or an independent person, committee or organization.

(b) If the Special Committee finds the question of limited significance, it may provide an informal opinion to the questioner.

(c) If, however, it **the Special Committee** finds the questions of sufficient general interest and importance, it may render a formal opinion, in which event it shall cause the opinion to be published in complete or synopsis form.

(d) ~~Furthermore,~~ The Special Committee may issue formal opinions on its own motion under such circumstances, as it finds appropriate.

(e) The Special Committee may decline to issue an opinion when a majority of the Special Committee members determine that it would be inadvisable to respond to the request and to have so confirmed in writing their reasoning to the person who requested the opinion.

(f) All formal opinions of the Special Committee shall be filed with the Supreme Court and shall be a matter of public record except for the names of the persons involved, which shall be excised.

(g) Both formal and informal opinions shall be advisory only; however, the Commission on Judicial Performance, the Supreme Court and all other regulatory and enforcement authorities shall consider reliance by a judicial candidate upon the Special Committee opinion in any disciplinary or enforcement proceeding.

(3 5) Notice and Authority. Upon receipt of a written allegation indicating a violation by a judicial candidate of any provision of Canon 5 during the course of a campaign for judicial office, or indicating actions by any person(s), committee(s) or organization(s) which are contrary to the limitations placed upon candidates by Canon 5, the Commission staff shall immediately forward a copy of the allegation by e-mail, ~~and~~ **or** U.S. mail to the Special

Committee members and the judicial candidate, and said **the Special** Committee shall:

- (a) in a manner which comports with due process, provide the candidate with a list of provisions he or she is accused of violating, and provide the candidate an opportunity to respond;
- (b) seek, from the informing party and/or the subject of the information, such further information on the allegations as it deems necessary;
- (c) conduct such additional investigation as the **Special** Committee may deem necessary;

(6) Action. The Special Committee may:

(d a) determine whether the allegations warrant speedy intervention and, if so, immediately issue a confidential cease-and-desist request to the candidate and/or organization or independent committee or organization believed to be engaging in unethical and/or unfair campaign practices. If the **Special** Committee determines that the unethical and/or unfair campaign practice is of a serious and damaging nature, the **Special** Committee may, in its discretion, disregard the issuance of a cease-and-desist request and immediately take action authorized by the provisions of paragraph ~~(3)(c)(i) and (ii)~~ **(6)(b)(i) and (ii)**, hereafter described. If the allegations of the complaint do not warrant intervention, the **Special** Committee shall dismiss the same and so notify the complaining party.

(e b) If a cease-and-desist request is disregarded or if the unethical or unfair campaign practices otherwise continue, the **Special** Committee is further authorized:

- (i) to immediately release to all appropriate media outlets, as well as the reporting party and the person and/or organization against whom the information is submitted, a public statement setting out the violations believed to exist, or, in the case of independent persons, committees or organizations, the actions by an independent person, committee or organization which are contrary to the limitations placed upon candidates by Canon 5. In the event that the violations or actions have continued after the imposition of the cease and desist request, the media release shall also include a statement that the candidate and/or organization or independent person, committee or organization has failed to honor the cease-and-desist request, and

(ii) to refer the matter to the Commission on Judicial Performance or to any other appropriate regulatory or enforcement authority for such action as may be appropriate under the applicable rules.

(4 7) **Informality and Timing.** All proceedings under this Rule shall be informal and non-adversarial, and the Special Committee shall act on all requests within ten (10) days of receipt, ~~either in person, by facsimile, by U.S. mail, or by telephone.~~ In any event, the Special Committee shall act as soon as possible taking into consideration the exigencies of the circumstances and, as to requests received during the last ten (10) days of the campaign, shall act within thirty-six (36) hours.

(5 8) **Confidentiality.** Except as herein specifically authorized, the proceedings of the Special Committee shall remain confidential, and in no event shall the Special Committee have the authority to institute disciplinary action against any candidate for judicial office, which power is specifically reserved to the Commission on Judicial Performance under applicable rules.

(6 9) **Judicial Performance.** The Committee shall after conclusion of the election distribute to the Commission on Judicial Performance copies of all information and all proceedings relating thereto.

(7 10) **Applicability.** This Canon 5F shall apply to all candidates for judicial offices of the Supreme Court, Court of Appeals, chancery courts, circuit courts and county courts, be they incumbent judges or not, ~~and to the families and campaign/solicitation committees of all such candidates. Persons who seek to have their name placed on the ballot as candidates for such judicial offices and the judicial candidates' election committee chairpersons, or the chairperson's designee, shall no later than 20 days after the qualifying date for candidates in the year in which they seek to run complete a two-hour course on campaign practices, finance, and ethics sponsored and approved by the Committee. Within ten days of completing the course, candidates shall certify to Committee that they have completed the course and understand fully the requirements of Mississippi law and the Code of Judicial Conduct concerning campaign practices for judicial office. Candidates without opposition are exempt from attending the course.~~

Commentary

Provision is made for the Special Committee to issue opinions to judicial candidates. Ordinarily, absent extraordinary circumstances or statutory authority to the contrary, when a judge or candidate, relying on the opinion of the Special Committee, acts in accordance with the opinion and the opinion is based on a full disclosure of facts and circumstances, the judge or candidate will not be subject to disciplinary or enforcement action or liability.